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No. 82-432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL NO. 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,

Petitioners,

RAYMOND DONOVAN, SECRETARY OF LABOR,

Intervenor,

v.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

The issues presented by this case require a determination of the parameters of a district court's authority under Section 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412, to remedy alleged violations of Title I of the Act occurring in the context of a union's election of officers which, but for the mechanistic task of tabulating the ballots, has been completed. Petitioners have argued that a district court exceeds its statutory authority under Title I by ordering relief which nullifies ballots cast in an election, imposes

rules on the union to be utilized in a rerun election, and appoints third parties not associated with the union to conduct the election under the court's supervision. Additionally, Petitioners maintain that in this case the election had been "already conducted" at the time an injunction was issued preventing tabulation of the ballots, and, therefore, challenges to the election were subject to the exclusive jurisdiction of the Secretary of Labor pursuant to § 403 of the Act.[1] 29 U.S.C. § 483.

Respondents seek to avoid consideration of these issues by suggesting the absence of an active case or controversy. Petitioners will address those arguments before discussing the case on the merits.

I. THE MATTER BEFORE THE COURT PRESENTS A LIVE CASE OR CONTROVERSY

A. The "Stipulations"

Respondents assert that the election of officers conducted by Local 82 in December, 1980 was nullified by the Union's[2] effort to settle the case by offering to conduct a new election of officers and that there is no active case or controversy between the parties (Resp. Br. at 23, 25).[3] But to terminate a case, there must be a "settlement be-

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[1] Petitioners have not argued that a district court *never* has jurisdiction to consider Title I complaints in the context of a union election of officers. Rather, Petitioners have challenged the district court's jurisdiction to grant the type of relief ordered in this case. Thus, most of the arguments presented by the Association for Union Democracy as *amicus* in support of Respondents and advocating reconsideration of this Court's decision in *Calhoon* v. *Harvey*, 379 U.S. 134 (1964), do not deal with the questions before the Court.

[2] Petitioners-Defendants will be referred to collectively as the "Union." Respondents are referred to as such or as "Plaintiffs."

[3] The argument was presented to, and rejected by, the court of appeals. "We emphasize, however, that we do not uphold the injunction on the theory that defendants were bound by their stipulations." (Pet. App. B at 78a).

tween the parties of every material controversy which the record presented." *Buck's Stove & Range* v. *Amer. Fed. of Labor*, 219 U.S. 531 (1911).

As the court of appeals recognized, the Union's offer to conduct a new election was never converted into a "stipulation," (Pet. App. B at 72a n.22), since there was never an agreement between the parties or mutual assent.[4] *United States* v. *Hall*, 424 F. Supp. 508, 547 (W.D. Okl. 1975), *aff'd*, 536 F.2d 313, 323 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976); *United States* v. *Harris*, 542 F.2d 1283, 1297 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977); *U.S.* v. *Three Winchester*, 504 F.2d 1288, 1290 (7th Cir. 1980). When the proposal to conduct a new election was offered in court on January 9, 1981, it was rejected by the Plaintiffs.[5]

At the court's insistance (R. 458-59, 471-72), a week was spent exploring the possibilities of a settlement, after which Plaintiffs' counsel reported to the court on January 15, 1981 that "there is no agreement per se at this point" (JA 101).[6] Contrary to Respondents' repeated unsupported assertions in their Brief, there was never an agreement between the parties on the Union's election

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[4] "Unless it is clear from the record that the parties assented, there is no stipulation . . . ." 73 Am. Jur. 2d, Stipulations § 2.

[5] Plaintiffs' counsel contended the offer was "lacking in several respects . . ." (R. 451); did not alter the Union's disputed candidate-eligibility rules (R. 452); and would not be acceptable unless incorporated into a court order (R. 453). Counsel further advised the court that Plaintiffs would never be able to agree with the Union over key election procedures (R. 473-74). Further disagreement arose over the incorporation of any stipulation into a court order (R. 460-61). Both parties recognized the "stipulations" as an alternative to a court-ordered election, as did the court (R. 495-96).

[6] Indeed, counsel advised the court that he objected "to the entirety" of the Union's proposal (R. 507).

proposal and, thus, was never a "stipulation" for the court to accept[7] (Resp. Br. at 23, 25). The most apparent evidence in support of the Union's position is the existence of the court's order, since the court advised the parties that no order would issue to cover "stipulated" matters (R. 509).

The hearings which led to the preliminary injunction of July 13, 1981 were conducted because the Union's proposal had not been accepted (JA 101-02, 06). The Union repeatedly challenged the court's authority to modify that proposal or to incorporate it into a court order requiring a new election.[8] And the court reassured

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[7] This is not the only liberty taken by Respondents in presenting their version of the case. The record does not support their claim that the Union declared the 1980 election to be null and void (Resp. Br. at 15, 23, 25). The court never granted the Union leave to declare the ballots cast in the 1980 election to be null and void (Resp. Br. at 9). In fact, the Union never made such a request or declaration. Respondents' approach to the record is best exemplified by their footnotes 2 and 4 (pages 4-7 and 9, respectively). In note 2, they misrepresent Mrs. Noonan's response to a statement of the court by omitting an interposed statement of the court to which Mrs. Noonan was responding. (*See*, R. 462-63 for complete statements of the court and counsel). In note 4, Respondents cite two statements in a manner which suggests they were made contemporaneously and constitute the Union's consent to the court's imposition of non-Union supervisors to conduct the election. Yet, the statements were made at hearings conducted on January 23 and March 6, 1981 and the latter statement was preceded by Union counsel's repetition of the contention "that the Court does not have the authority to dictate the terms of the election" and counsel's admonition that "it would be a gross misrepresentation . . . [for the court to] conclude from our silence that we were finding acceptable either the third party that Mr. Stern comes up with or the special master [selected by the court]." (JA 104, 112).

[8] R. 66-70, 460-61; JA 106, 110, 112. The district court often expressed its conviction that it had authority to order election terms if the parties failed to agree to stipulated procedures (JA 101; R. 500, 508). The court of appeals noted the Union's continuing objections to the district court's authority with regard to these issues (Pet. App. B at 73a).

the Union that its participation in the negotiations over the terms of the new election would not "waive your basic exception to the Court's ordering [a new election] . . ." (JA 111-12).[9] Nor can the Union's compliance with the district court's injunction be interpreted as waiving the Union's objection to the court's authority to order the new election. *Bakery Sales Drivers Union* v. *Wagshal*, 333 U.S. 437 (1948).

All parties recognized that the court's decision to order an election raised significant jurisdictional questions (JA 101-02, 110; R. 558). It is those questions which are pending before this Court. And in their application for attorney fees, Respondents recognize that the relief obtained was by court order, not the consent of the Union (Pet. Br. App. at 2a-5a). This Court, as did the court of appeals, has rejected Respondents' previously offered contention that the case is moot because of the "stipulations" and it is apparent that there has never been a "settlement between the parties of every material controversy which the record presented." [10]

B. The Case Is Not Presently, Nor Is It About To Become, Moot

Respondents allege that the case is justiciable only to the extent that the officers elected as a result of the court-ordered 1981 election remain in office. They contend that

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[9] The district court rejected Plaintiffs' contention that the Union, by offering its proposal, conceded that the court had jurisdiction to rerun the election (R. 491).

[10] Only two of the cases cited by Respondents in the first section of their brief purportedly support their proposition regarding the "stipulations." *Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), involved an attempt to appeal after plaintiff accepted a remittitur in lieu of a new trial, a situation not similar to the facts of this case. *Marviraxon Companía, Etc.* v. *H.J. Baker & Bros.*, 674 F.2d 364 (5th Cir. 1982), neither stands for the proposition cited nor discusses any issue relevant to this case.

this Court will be unable to grant the requested relief once the Union's next election of officers is held (Resp. Br. at 28-29 and n.13). Respondents offer no authority to support these positions, and, in fact, the cases are to the contrary.

1. *An Intervening Election Will Not Moot The Issues Before The Court*

The Union has requested this Court to nullify the results of the court-ordered 1981 election and to permit it to retrieve and count the ballots cast in the 1980 election. Thereafter, any member would be entitled to pursue the remedies available under Section 402 of the Act, 29 U.S.C. § 482, to challenge the validity of that election. While Respondents apparently challenge the Court's authority to grant such relief once the 1983 election has been conducted, this Court has held that an intervening election deprives neither the Secretary of Labor of the authority to challenge a prior election nor a court of its jurisdiction to consider such a challenge. *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463 (1968); *Wirtz* v. *Local Union No. 125*, 389 U.S. 477 (1968).[11]

Respondents misanalyze the import of these cases, (Resp. Br. at 30 n.14), and their unsupported claim that the Secretary could not exercise any authority with respect to the 1980 election if this Court nullifies the 1981 election is simply not correct. *Cf.*, *Dunlop* v. *Bachowski*, 421 U.S. 560, 575-76 (1975). It is submitted that Respondents' claim that the district court's impropriety can be washed away by the happenstance intervention of an unsupervised election is as incorrect as the contention rejected in *Glass Bottle Blowers*. 398 U.S. at 474.

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[11] This Court has applied the *Glass Bottle Blowers'* rationale to reject claims of mootness based upon the modification of a bylaw provision challenged in a suit by the Secretary of Labor. *Wirtz* v. *Hotel Employees Union*, 391 U.S. 492, 500 n.9 (1968).

These cases also are relevant to Respondents' contention that an intervening event can moot the case. In *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979), this Court held that an intervening event will not moot a case unless it has "irrevocably eradicated the effects of the alleged violation." Yet this Court recognized in *Glass Bottle Blowers* that the effects of an improper election cannot be purged without utilizing Title IV's procedures. 389 U.S. at 474-75. If the 1981 court-ordered election was improper, its effects will not be eradicated by the 1983 election.

Thus, the 1983 election will not nullify the Secretary of Labor's authority with respect to the 1980 election or render moot the issues before the court.

2. *The Collateral Effects of the Lower Court's Decisions Prevent Mootness*

Respondents ignore the fact that there are claims for damages resulting from the district court's injunction. Those claims cannot be resolved unless there is a decision on the merits of this appeal. And this Court has recognized that collateral claims which create "a substantial stake in the judgment" prevent a case from being considered to be moot. *Liner* v. *Jafco*, 375 U.S. 301, 305-07 (1964); *Walling* v. *Reuter, Inc.*, 321 U.S. 671, 674-75 (1944). There were no similar claims for damages in *Canez* v. *Guerrero*, 707 F.2d 443 (9th Cir. 1983), relied upon by Respondents.

Among the pending claims is that of Petitioner George Harris, former president of the Union who lost his bid for re-election in the court-ordered 1981 election. If Harris won the 1980 election, in which he was a candidate, he would have a claim for back salary lost as a result of the improper injunction. Such a claim for payments wrongfully withheld has been held to be sufficient to maintain a "live" case or controversy. *Powell* v. *McCormack*, 395 U.S. 486, 496-99 (1969); *Stanton* v. *Stan-*

ton, 421 U.S. 7, 11 (1975). Harris' loss in the rerun election also distinguishes this case from *Canez*, in which all of the incumbent officers were re-elected. 707 F.2d at 445, 446.

Another claim pending here involves Respondents' application for a substantial award of attorney fees (Pet. Br. App. at 1a-7a). That application cannot be resolved, either in terms of entitlement or amount, unless this Court determines whether the district court had authority to grant any relief or, if jurisdiction existed to grant some relief, the extent thereof. Such outstanding questions have been held to maintain a "live" controversy between the parties. *Kerr* v. *Screen Extras Guild, Inc.*, 466 F.2d 1267, 1270 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); *Yablonski* v. *Mine Workers*, 459 F.2d 1201 (D.C. Cir. 1972). In contrast, the *Canez* court denied plaintiff's application for attorney fees. 707 F.2d at 447.

Also to be resolved is Respondents' claim for damages in the amount of $15,000.00 (JA 33), and the Union's claim for the costs incurred in the court-ordered election. The Union has additional claims resulting from the overbreadth of the injunction. *Monroe Div., Litton Business Systems* v. *De Bari*, 562 F.2d 30, 32 (10th Cir. 1977). This Court has recognized financial claims as being sufficient to preclude a finding a mootness even if other issues are resolved between the parties or by supervening events.[12] *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9-10 1974); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 216 n.9 (1977); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 8-9 (1978). Again, this Court must reach the merits of the pending claims in order for the lower court to determine the respective claims for

[12] Respondents misquote *Moore's Federal Practice* on this point, (Resp. Br. at 22 n.9), a fact apparent from that publication itself, as well as from this Court's decision in *Powell* v. *McCormack*, 395 U.S. at 497. *See also, Central Soya Co., Inc.* v. *Consolidated Rail Corp.*, 614 F.2d 684, 687 n.4 (7th Cir. 1980).

damages. *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149, 154 n.3 (1978).

Finally, this Court's decision will resolve whether the lower courts have jurisdiction to consider Respondents' motion for contempt based on the July 13, 1981 injunction. Respondents had sought compensatory and punitive damages in that action, as well as attorney fees. It is well established that a proceeding for civil contempt is part of the original action and a contempt judgment stands or falls with the validity or invalidity of the order. *Latrobe Steel Co.* v. *United Steelworkers*, 545 F.2d 1336, 1345-46 (3d Cir. 1976); *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 444-45 (1911). Thus, the right of Respondents to pursue a motion for contempt and to recover their alleged damages will be controlled by resolution of the merits of the issues in this appeal.[13] *See, Trans Int'l Airlines* v. *Teamsters*, 650 F. 949, 955 (9th Cir. 1980), *cert. denied*, —— U.S. —— (——).

The unresolved collateral disputes between the parties prevent a finding of mootness and require that a decision be rendered on the merits of the issues presented in the petition.

3. *The Issues In Dispute Are Capable of Repetition, Yet Evading Review*

Respondents' claims of mootness must also be rejected based on the "capable of repetition, yet evading review" doctrine recognized by this Court.[14] This Court has frequently utilized that test in election cases,[15] finding it ap-

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[13] On August 31, 1983, the district court dismissed the motion for contempt as being without merit.

[14] *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125-26 (1974). The doctrine has also been applied to cases involving private conduct. *Central Soya Co., Inc.* v. *Consolidated Rail Corp.*, 614 F.2d at 688-89 and n.7.

[15] *E.g., Democratic Party of U.S.* v. *Wisconsin*, 450 U.S. 107, 115 n.13 (1981); *Mandel* v. *Bradley*, 432 U.S. 173, 175 n.1 (1977); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5 (1973).

propriate, even after the election in question has been completed and the results cannot be affected, to resolve misunderstandings as to the application and facial validity of electoral statutes. *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969).

Use of the "capable of repetition, yet evading review" doctrine requires a challenged action which is too short in duration to be fully litigated and to which the complaining party is again likely to be subjected. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Respondents do not contest the inability of union election cases to be fully litigated during the interval between regularly scheduled elections.[16] Rather, they claim that, in this case, it is unlikely that the identical parties will again be involved in the same litigation because some of the Respondent Union members are no longer in the Union and because the Union has been enjoined from violating the law in the future (Resp. Br. at 32).

As this Court has been advised, Respondents brought a contempt proceeding before the district court alleging that the Union violated the terms of the 1981 injunction. Thus, it is disingenuous for them to have represented to this Court that "there is virtually no chance of a recurrence of the complained of conduct" (*id.*) because of the injunctive order while they pursued a contempt motion alleging a violation of that injunction. Moreover, during the course of the contempt proceeding, Respondent Jerome Crowley indicated his intent to run for office in the 1983 election and, at oral argument on March 31, 1983, counsel

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[16] That reality has been implicitly recognized by this Court in *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463 (1968), and its progeny. And if this Court adopts the rationale of the *Canez* court, this type of case will never be fully litigated. If the incumbents win a court-ordered election the case will be moot, while if the challengers are successful in the court-ordered election and assume control of the union, they will not continue the union's challenge to the court's authority to have ordered the election.

for Respondents suggested that it might be necessary for some entity to supervise the 1983 election.

The burden of proving mootness "is a heavy one" and must be borne by the party advancing that contention. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). It is submitted that the record in this case does not support Respondents' position. Here, as was the case in *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, the event which gave rise to the litigation reoccurs on a regular cycle. At least some of the Respondents and the Union as an entity will soon be engaged in an election in which there is a "reasonable likelihood" that the Union will be subjected to a suit raising similar questions of the interpretation and application of Titles I and IV of the LMRDA. That is sufficient to satisfy the "capable of repetition, yet evading review" doctrine.[17] *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377 (1979.

Thus, the statutory interpretation issues pending before this Court should be resolved on the merits at this time.

II. THE ORDERS OF THE LOWER COURTS ARE INCONSISTENT WITH THE STATUTE

The relief requested from this Court is predicated on the Union's contention that the district court should have dismissed the complaint because Respondents were requesting a remedy which necessitated the nullification of the election and the conduct of a rerun election.[18] Thus, in the Union's view, Respondents were not requesting relief which was "appropriate" under Title I. If the

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[17] The Union need not demonstrate that identical violations will occur which will result in an identical order from the district court, as Respondents allege (Resp. Br. at 32).

[18] At the first hearing in this case, Respondents' counsel advised the court that if the relief requested were granted, "defendants are going to have to hold a new election . . ." (JA 80).

Court accepts this position, a remand to the lower court with direction to dismiss the complaint, vacate the injunction and release the ballots cast in the 1980 election would be proper. Yet in so doing, the Court need not preclude a district court from ever considering a pre-election complaint seeking "appropriate" relief for a violation of Title I.[19]

A. The Relief Granted Was Not "Appropriate" Under Section 102

Respondents have elected to ignore the specific references in the legislative history set forth in the opening briefs of the Union and its supporters which evidence the Congressional intent to vest primary authority for the supervision of union elections of officers in the Secretary of Labor, not the judiciary. Similarly, they have declined to challenge the numerous decisions of this Court which have reviewed that history and concluded that Congress vested the Secretary of Labor, the agent of government "most familiar with union problems," with authority to seek nullification of union elections of officers and with responsibility for supervising rerun elections. *Calhoon* v. *Harvey*, 379 U.S. 134, 139-40 (1964). Thus, the Union relies upon the discussion of these matters set forth in its opening brief (at 16-30). The Union replies to Respondents' major contentions as follows:

1. The adoption of Title I was not exclusively motivated by Congress' perception that Title IV was insufficient to adequately regulate union elections of officers, as Respondents contend. Rather, Congress was primarily concerned that the pending legislation did not guarantee union members the right to participate in other "vital

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[19] There is simply no basis for Respondents' allegation that the Union and its supporters urge the Court to require the federal courts to "disregard all Title I violations" (Resp. Br. at 52). Rather, the Union's position is similar to that expressed by Circuit Judge Campbell, in dissent (Pet. App. B at 82a-85a).

union decisions."[20] Although Section 101(a)(1), 29 U.S.C. § 411(a)(1), protects the right to nominate candidates and vote in elections, unions conduct many elections and referenda which are not governed by Title IV. Nominations and elections of business agents, shop stewards, hiring hall dispatchers and other union officials are not regulated by Title IV because these persons are not "officers" within the meaning of the Act.[21] Yet Congress intended to ensure union members the right to participate in these elections as well. Other common electoral matters not covered by Title IV, but of concern to Congress, included strike and contract ratification votes, assessments, and dues increases.[22]

By upholding the primary jurisdiction of Title IV over elections of union officers, this Court need not minimize Title I's extensive role in protecting union members' rights in other electoral matters. But recognition of Title I's importance in the context of non-"officer" elections does not require a conclusion that Title I was to be broadly interpreted to supplement or replace Title IV's procedures governing "officer" elections. Respondents' failure to recognize the broader scope of Title I's coverage leads to their faulty conclusion as to the relative role of that Title in the context of elections of officers.

2. The fact that Congress desired union election disputes to be expeditiously resolved does not support the conclusion that officer elections were intended to be overturned based on facts developed during hearings on preliminary injunctions, technical violations, or statutory breaches which did not affect the outcome of the election.[23]

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[20] S. Rept. No. 1684, 85th Cong., 2d Sess., at 52-53 (1958).

[21] *See*, 29 U.S.C. § 402(n).

[22] S. Rept. No. 1684, *supra* n.20, at 56-58.

[23] *Wirtz* v. *Hotel Employees Union*, 391 U.S. 492, 505 n.11 (1968).

Rather, Congress intended the elaborate hearing and review procedures of Section 402 to focus on the *merits* of allegations of impropriety and required a determination of their effect on the outcome of an election. This Congressional objective cannot be achieved through a hearing on a motion for a temporary or preliminary injunction which does not focus on the merits of a case.[24] *Benson Hotel Corp.* v. *Woods*, 168 F.2d 694, 696 (8th Cir. 1948); *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Com'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). And when, as in this case, a district court grants essentially the permanent relief requested after a preliminary hearing at which plaintiffs are only required to establish cause for emergency relief, defendants are denied their due process rights to have plaintiffs meet the more stringent burden of proving the merits of their claims. *Public Service Com'n* v. *Wisc. Telephone Co.*, 289 U.S. 68, 70 (1933).[25]

Adoption of Respondents' contentions would result in the vast majority of Title IV issues being resolved in a perfunctory manner in which the only criteria would be whether a violation *may* have occurred rather than an evaluation of whether the violation *did* occur and may have affected the outcome of the election. Resolution of

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[24] In this case, for example, the temporary restraining order was issued before any live testimony had been presented to the court. Similarly, in *Canez* v. *Guerrero*, the court did not even hear the union's answer to the complaint before granting the injunctive relief requested. 707 F.2d at 445.

[25] To enable courts to fashion the prompt and flexible pre-election relief which Respondents and their *amicus* suggest is the preferable method of resolving election complaints, these issues must be considered on expedited motions for temporary or preliminary relief. Otherwise, the civil litigation process will be subject to the same delays Respondents find so reprehensible in post-election suits brought by the Secretary of Labor.

election complaints in this fashion ignores the legislative history set forth in the Union's opening brief (at 28-30), as well as principles of equity and due process.

3. Respondents' contention that the Secretary of Labor is powerless to redress the type of violations at issue in this case is totally without merit (Resp. Br. at 65-72). Even a cursory examination of the suits filed by the Department of Labor confirms the Secretary's willingness to file Title IV suits to challenge the type of conduct complained of here.[26] Thus, in *Hodgson* v. *Aircraft Workers Alliance*, No. C68-743 (N.D. Oh., filed Oct. 3, 1968),[27] the Secretary successfully litigated a complaint based on a candidate's disqualification due to a union's internal disciplinary proceeding which violated Section 101(a)(5), 29 U.S.C. § 411(a)(5). *Hodgson* v. *Machinists, District Lodge 508*, C-71-663-RFD (N.D. Cal., filed Apr. 6, 1971)[28] involved a successful suit brought in response to a complaint that nominees' names had not been properly recorded by the union with the result that opposition was limited or eliminated. In *Goldberg* v. *Asociasion Insular de Guardianes*, No. 120-61 (D.P.R., filed June 9, 1961),[29] a new election was obtained where the union had failed to list the names of some candidates on the ballot. Cases brought to challenge union rules which prevented mem-

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[26] *See*, U.S. Department of Labor, *Union Officer Elections and Trusteeships Case Digest* (1980). This publication also evidences the unreliability of the statistics developed in the Yale Law Journal Note cited by Respondents in support of their contention that the Secretary does not deal with election complaints in an expeditious manner (Resp. Br. at 74-76). Those statistics ignore the numerous instances in which the Secretary succeeds in obtaining a new election by agreement, rather than litigation.

[27] *Id.* at 346.

[28] *Id.* at 344.

[29] *Id.* at 608.

bers from attending and/or participating in the nomination meeting are legion.[30]

To the extent this portion of Respondents' argument has any support, it relies on law review articles which advance public policy claims that pre-election relief is preferable to post-election remedies.[31] That question is one which Congress resolved against Respondents in 1959, and it is not for this Court to alter that legislative judgment.

4. Neither the Union, nor the AFL-CIO as *amicus* in its support, has contended that Congress intended to grant state court remedies preferential treatment to those in Title I, as Respondents allege (Resp. Br. at 84). As the Union noted in its opening brief, Section 403's preservation of existing state remedies regarding elections of union officers was the subject of political compromise between those who sought to preempt all state laws in this area and those seeking to preserve such remedies.[32] To reconcile these views, Section 403 preserved state remedies "to enforce the constitution and bylaws of a labor organization" and limited that authority "to elections prior to the conduct thereof . . . ." 29 U.S.C. § 483.

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[30] *Id.* at 527-639.

[31] Respondents' misrepresent *Navarro* v. *Gannon*, 385 F.2d 512 (2d Cir. 1967), cert. denied, 390 U.S. 989 (1968), as a Title IV case (Resp. Br. at 71). In fact, it dealt exclusively with Title I issues. 385 F.2d at 514. Equally inaccurate is their contention that the *Canez* decision supports their view of the Act (Resp. Br. at 72). As Respondents themselves have noted, that case was dismissed as moot, the circuit court declining to consider the merits of the appeal. 707 F.2d at 446-447.

[32] *Compare*, testimony of Clyde Summers *with* that of Archibald Cox before the Senate Labor and Public Welfare Committee. *Union Financial and Administrative Practices, Hearings Before The Senate Subcommittee on Labor and Public Welfare*, 85th Cong., 2d Sess. 613 (statement of Clyde Summers) and 881 (statement of Archibald Cox) (1958).

Contrary to Respondents' inference, there was no extensive body of state law in existence governing the details of union elections with which Congress intended to supplement the requirements of Title IV[33] (Resp. Br. at 87). Rather, in adopting Section 403, Congress merely preserved the authority of state courts to enforce union constitutions. And Congress deliberately preempted that law once the election has been held.[34] State courts have not been granted any greater authority than federal courts to set aside the results of union elections of officers upon direct complaints from union members.

Thus, Respondents' arguments do not refute the Union's review of the legislative record and decisions of this Court which establish that Congress did not intend federal courts to rerun union elections of officers under Title I. While pre-election remedies under Title I are not precluded merely because a violation occurred in the context of an election of officers, the relief granted by the district court in this case was not "appropriate" because it nullified an election and conditioned its rerun on the supervision of the court.

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[33] "The present law does not provide adequate guarantees. Although suits have been brought in State and Federal courts, few useful rules have developed. . . . A (State) court can do no more than enforce the union's own constitution and bylaws." *Senate Labor and Public Welfare Committee Hearings, Labor-Management Reform Legislation*, 86th Cong., 1st Sess. 132-33 (1959) (statement of Archibald Cox). *See also*, Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1221, 1222 (1961). (Respondents incorrectly assert that this article was written "before the passage of the LMRDA . . . and did not consider Title I issues at all . . ." (Resp. Br. at 86 n.49). In fact, it was written after the Act. *See*, 70 Yale L.J. at 1221.)

[34] Respondents inaccurately quote the Columbia Law Review note which criticized this Court's decision in *Calhoon* v. *Harvey*, 379 U.S. 134 (Resp. Br. at 85 n.48).

B. The Election At Issue Was "Already Conducted" Under Section 403

In response to the Union's contention that the election here was "already conducted" at the time the district court enjoined the tabulation of the ballots, Respondents assert that the cases relied on by the Union do not support that proposition. They contend that *Canez* v. *Guerrero*, 707 F.2d 443, "is in accord with the decision of the First Circuit in the instant case" (Resp. Br. at 91), suggesting that the Ninth Circuit agreed that the suit here sought pre-election relief. Yet the *Canez* court referred to this case as involving a request for *post-election* relief no fewer than three separate times during its brief decision. 707 F.2d at 446 and n.1.

Respondents' analysis of the other cases relied upon by the Union is no more accurate. In *Laski* v. *Inter. Org. of Masters, Mates & Pilots*, 502 F. Supp. 134, 136 (S.D.N.Y. 1980), the court rejected an attempt to enjoin the tabulation of ballots in a mail election, holding that an election was conducted once "the actual voting process is under way." There, as here, suit was filed after the ballots had been distributed to the members. 502 F. Supp. at 135. Yet that court adopted the reasoning of the Third Circuit in *McDonough* v. *Local 825, Operating Engineers*,[**] while the courts in this case rejected that rationale (Pet. App. A at 10a; Pet. App. B at 67a). *New Action Coalition* v. *Local 2, United Fed. of Teachers*, 510 F. Supp. 1208 (S.D.N.Y. 1981), also was a post-election case under *McDonough*, but would have been pre-election had that court adopted the First Circuit's interpretation that "an election is not 'already conducted' until all the ballots are counted. . . ."

Thus, the courts of appeal for the Second, Third, Ninth and District of Columbia circuits stand in opposition to the position taken by the First Circuit in this case. It is

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[**] 470 F.2d 261 (3d Cir. 1972).

submitted that the Union's position that an election has been "already conducted" at the point when the requested relief would necessitate nullification of ballots already cast and the conduct of a new election is more in accord with the legislative history and the decisions of the courts than is the mechanistic formula adopted by the lower court.

III. CONCLUSION

For the reasons set forth above and in the opening brief, it is requested that the case be considered on its merits and the decision below reversed.

Respectfully submitted,

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